ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing	)	CC Docket No. 98-170
and Billing Format	)	

REPLY COMMENTS

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December 16, 1998

SUMMARY

The Commission has the jurisdiction to deal with consumer complaints about telecommunications carrier rates and practices under the Section 208 complaint process. It does not need to impose affirmative regulation on customer billing in the CMRS market absent a record showing a history of problems. Moreover, regulating CMRS billing practices would contravene the Commission's traditional deregulatory approach to wireless services and the Congressional mandate to rely primarily on market forces rather than regulation.

Comcast urges the Commission to take into account the unique market structure and competitive nature of the CMRS marketplace before taking any action in this proceeding. A preliminary analysis of the CMRS carriers' practices demonstrates that the Commission should not include CMRS within the scope of the proposed billing regulations. The comments filed illustrate that none of the problems the *Notice* addresses are significant issues in the CMRS industry.

CMRS customers are not victims of slamming and cramming. CMRS technology and the direct relationship most CMRS customers have with their carrier by and large prevent slamming and cramming, as Congress recognized when it exempted CMRS from anti-slamming legislation introduced in this last legislative session.

If the Commission chooses to regulate CMRS billing practices, it should do so in the form of general, flexibly applied guidelines that do not impair CMRS carriers' ability to innovate with new types of billing and service plans. For example, the Commission should maintain for

CMRS the flexibility of choosing how to bill and provide subscribers with the information that the Commission ultimately determines must be disclosed. Carriers should be allowed to make any required disclosures in materials other than monthly billings, such as Internet websites, welcome kits, service plan brochures and through service change notifications.

Mandatory contribution to the federal universal service program is an additional cost of doing business that CMRS providers, unlike interexchange carriers, are unable to offset. Thus, any safe harbor language that includes language addressing reductions in the CMRS carrier's costs of providing service would be inaccurate as to CMRS. While the Commission should be concerned that the information carriers provide to customers not be misleading, it should not adopt strict billing and content format rules that would unduly restrict carriers' First Amendment rights, ignore customer preference for shorter and simpler bills, and hamper introduction of new technological capabilities.

The Commission's concern about CMRS carriers' potential overrecovery of universal service contributions is unwarranted. Because the program itself has been in flux, and the Commission's guidance to rate-deregulated carriers, of necessity, very general, it is not surprising that CMRS carriers have taken a variety of approaches in their assessments to customers. While CMRS carriers may have chosen different assessment methods, the Commission does not have enough information to make judgments as to the reasonableness of individual carriers' surcharges. Gathering this information would be a complex exercise of dubious value. Moreover, any such review that results in a requirement for CMRS carriers to restructure their cost recovery would entail a full regulatory rate prescription process under

Section 205 of the Act, which would represent a regression in a competitive market such as CMRS.

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REPLY COMMENTS

Comcast Cellular Communications, Inc. ("Comcast"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.[1/] Comcast respectfully submits that the comments aptly demonstrate that adoption of onerous billing regulations applicable to all telecommunications carriers, regardless of their specific market circumstances, would not advance the Commission's stated goals of ensuring that consumers receive thorough, accurate and understandable bills from their carriers.

The Commission has expressed its desire for consumers "to reap the benefits of the competitive marketplace while at the same time protecting themselves from unscrupulous competitors."[2/] In order to reach this goal, the Commission, which has an unquestioned role in ensuring that carriers do not engage in illegal or deceptive billing practices, first must review the

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1/ Truth-in-Billing and Billing Format, CC Docket No. 98-170, FCC 98-232, *Notice of Proposed Rulemaking,* released September 17, 1998, (*"Notice"*).

2/ *Notice* at ¶ 6.

record to determine what specific problems may exist and then should determine whether its complaint procedure established under Section 208 of the Act is insufficient to address those concerns in light of that record. Comcast believes that the procedures under Section 208 of the Act provide the best means to guarantee clarity in CMRS billing, and recommends that the Commission not adopt any additional regulations with respect to CMRS. If the Commission feels the need to act, it should only do so through the adoption of flexible, non- binding guidelines regarding disclosure and formatting issues.

I. INTRODUCTION

A. The Commission's Jurisdiction

The Commission properly has jurisdiction over matters concerning CMRS billing. Most commenters agree or appear to concede that the Commission has at least non-exclusive jurisdiction over many, if not all, customer billing matters, pursuant to Title I or Title II of the Act.[3/] Even those State commissions that seek to maintain their prerogatives to regulate billing practices by local exchange carriers generally do not seek to assert state jurisdiction over CMRS carrier billing for interstate services.[4/] In fact, with respect to CMRS billing and billing practices, the 1993 amendments to Section 332 vest jurisdiction over all CMRS rate and entry regulation in the Commission. A necessary extension of that jurisdiction is authority over related billing practices.

[3/] *See* BellSouth's comments at 2. *See also* comments of the Electronic Commerce Association at 2-4 and Sprint at 3.

[4/] *See* comments of the Maine Public Utilities Commission at 2 and California Public Utilities Commission at 2.

In contrast to that position, PrimeCo asserts that the Commission billing regulation would parallel, if not conflict with, state authority to regulate CMRS billing practices.[5/] PrimeCo cites to the legislative history of the 1993 amendment to Section 332, which specifically enumerates customer billing among the "other" matters over which state commissions retain authority.[6/] However, while the Section 332 amendments did not assign exclusive jurisdiction to the Commission over all matters touching on CMRS billing, it would be irrational and unworkable for the Congress to have assigned exclusive jurisdiction over all CMRS rates to the Commission, only then to deny the Commission jurisdiction over disclosures or carrier practices pertaining to those rates.

1. For example, among the issues highlighted in the *Notice* is whether and to what extent carriers choosing to include a surcharge to recover mandatory universal service contributions may be overrecovering program-related costs. In this and other areas where the matter of a CMRS carrier's billing is inextricably linked to its charges, it is an

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[5/] PrimeCo comments at 15.

[6/] Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66, §6002, 107 Stat. 312, 387-97 (1993); 47 U.S.C.A. § 332(c)(3)(A); *See* H. Rept. 103-111 at p. 261, 1993 Cong. News at p. 588: "It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services [commercial mobile services]. By 'terms and conditions,' the Committee intends to include such matters as *customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (*e.g.*, zoning); transfers or control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions." (emphasis added).

overly simplistic analysis of jurisdiction to assert that the Commission is foreclosed from reviewing a carrier's practices.[7/]

The Commission should not seek to regulate the billing practices of the CMRS industry without a substantial analysis of the origin of the problems that might justify new rules, and without weighing the impact new rules would have on the unique context of the CMRS market. The Commission should exercise its jurisdiction, at least as to CMRS, by applying established standards and principles from its complaint process, rather than through comprehensive rulemaking, particularly if that regulation is geared to address the problems created by activities in other telecommunications markets. The Commission itself has already recognized that the remedial scheme provided for under Section 208 of the Act is sufficient to address consumer complaints against CMRS carrier rate or practice problems.[8/] No information described in the *Notice* or in any of the comments suggests changed circumstances mandating the need to revisit this approach.

[7/] The extent of the Commission's jurisdiction over CMRS billing is currently an issue pending before the Commission in the petition filed by Southwestern Bell Mobile Systems, Inc. for a declaratory ruling. *See*, Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls in Whole-Minute Increments, DA97-2464 (Public Notice, November 24, 1997) ("Smilow Petition"). This petition refers to the Commission the threshold question of the state jurisdiction over those CMRS billing practices which are inextricably tied to rates and ratemaking. *See,* Smilow v. Southwestern Bell Mobile Systems, Inc., Civ A. No. 97-10307, filed in the U.S. District Court, District of Massachusetts.

[8/] Implementation of Sections 3(n) and 332, Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, 1479 (1994) *("CMRS Second Report and Order").*

B. The Scope of Proposed Regulation

At the heart of the *Notice's* proposals regarding bill format and disclosure are two discrete concerns: first, that telecommunications service customers are facing a rising tide of slamming and cramming incidents; and second, that customers may be confused by new bill surcharges related to certain federal government programs such as universal service.[9/] The Commission cites a "tremendous growth in consumer complaints" resulting from unclear, misleading or unauthorized billing practices as the reason for the proposed billing reform.[10/] The *Notice* assumes that more and better presented information (either in form or content) in carriers' periodic bills will help to stem consumer fraud and confusion.

The Commission can, and should, play a role in ensuring that telecommunications service subscribers are not slammed, crammed or deceived by their carriers, to the extent such activities have been identified in a particular market segment. However, even then, given the fast pace of change in the telecommunications industry, the Commission's best response is through providing general guidelines which are applied flexibly to carriers and which take into account unique market conditions, rather than a proscriptive, regulatory approach. Flexible guidelines will yield the clearer, more consumer-friendly disclosures the Commission seeks-- as carriers in the affected markets naturally gravitate towards those guidelines -- while minimizing interference with carriers' ability to create billing methods, disclosures and marketing materials consistent with the concepts of competition and carriers' First Amendment rights.

[9/] *Notice* at ¶¶ 2-3.

[10/] *Id.*

In developing general guidelines, the Commission should draw lessons from its experience in other contexts where it has adopted broad rules for application across all telecommunications carriers only later to discover that they are ill-suited to particular classes of carriers such as CMRS.[11/] The Commission can avoid dislocations and unnecessary expense by carefully analyzing the source of both the problems and customer complaints it has identified, and then tailoring regulations or guidelines that effectively proscribe those particular illegal or deceptive practices in the specific markets where they are actually occurring.

The record strongly suggests that rules to prohibit slamming and cramming by CMRS carriers are unnecessary because the problem is non-existent. Virtually all of the commenters who addressed the impact of the proposed proscriptions on CMRS providers questioned the need to sweep CMRS within the scope of the proposed billing regulations.[12/] Generally, commenters

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[11/] *See, e.g.,* Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1997). In this Order, the Commission implemented Section 254(g) of the Act by requiring interstate services rate averaging for all telecommunications carriers, including CMRS. It was only after CMRS carriers petitioned the Commission for stay of the rules, that the Commission granted, that the Commission recognized a rate averaging regulation for CMRS could have uniquely anti-competitive effects. Similarly, in the context of universal service, the Commission adopted jurisdictional revenue reporting requirements on CMRS carriers who lacked the means to classify their revenues in this manner. The Commission has recently issued a Further Notice to adopt methods to provide CMRS carriers with additional certainty and consistency in their universal service reporting. *See,* Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, (released October 26, 1998) (*"Wireless USF Notice"*).

[12/] *See, e.g.,* BellSouth comments at i. Some non-CMRS commenters focused solely on the impact of the proposals on landline markets, which only suggests that they either did not perceive or did not find the need to address the problems identified by the *Notice* as CMRS problems.

viewed the *Notice's* proposals as unnecessary or unsuitable given the particular characteristics of the CMRS market. While the *Notice* did not specifically identify which telecommunications markets were spawning slamming and cramming complaints, it did not point to any meaningful evidence of problems with the CMRS market. If anything, it is reasonable to believe that the record chiefly concerns the practices of interstate interexchange carriers and not CMRS providers.[13/]

As a result, the Commission should only regulate -- beyond the Section 208 complaint process -- in markets where there is a demonstrated record of illegal or deceptive carrier practices. The Commission should refrain from regulating practices in competitive markets, like CMRS, where no meaningful record of customer fraud or deceptive practices has been established.

II. SLAMMING AND CRAMMING ARE NOT PROBLEMS PLAGUING CMRS CUSTOMERS

A. There Are Practical Reasons Why Slamming and Cramming Are Not CMRS Problems

The Commission has recognized that the CMRS industry operates in an increasingly competitive environment.[14/] Instances of slamming and cramming are not common in the

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[13/] *See Notice* at ¶ 2-4 mentioning that the difficulty in identifying service providers on telephone bills has encouraged the growth of slamming, and referring to the NARUC Resolution Regarding End User Surcharges Instituted by Interstate Carriers. *See also,* Notice at ¶ 25.

[14/] *See,* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Third Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 98-91, 12 Comm. Reg. (P&F) 623, 663 (1998) finding that

wireless marketplace because of the unique level of competition among CMRS carriers in each geographic market and the unique manner in which these services are sold to customers.[15/]

Comcast, for example, is one of six facilities-based CMRS competitors operating in the greater Philadelphia wireless services market. To attract and maintain wireless customers, Comcast must be responsive to its customers and prospective customers' needs and desires. Comcast has no history of customer complaints about cramming and slamming.[16/] This is not surprising given the way CMRS services are rendered. For example, when CMRS subscribers initiate service, or change service, they are making an affirmative choice of one CMRS operator among several. CMRS carriers typically package mobile handsets with information services and

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developments in the CMRS marketplace have been beneficial for customers as it is bringing additional choices at lower prices; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order, 13 FCC Rcd. 14915, 14931 at ¶ 25.

15/ The Commission has frequently acknowledged the particular nature of the CMRS market. The Commission in the *Customer Proprietary Network Information* ("CPNI") proceeding determined that CMRS was a separate category or market from either landline local or landline interexchange for purposes of inferring that a customer would expect that CPNI would be shared. Section 64.2005 of the Commission's Rules; Telecommunications Carriers' Use of Customer Proprietary Network Information, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 8081, 8091-92 (1998) (*"CPNI Second Report and Order"*). Among the issues on reconsideration in that docket is the Commission's need to further distinguish CMRS based upon the longstanding (and Commission endorsed) practice of bundling CPE and services in the CMRS marketplace. *See also Wireless USF Notice* at ¶ 6 (recognizing that CMRS carriers operate on a different basis than landline carriers).

16/ The *Notice* provides no examples of CMRS carriers switching subscribers to other providers or including undisclosed third party charges on their bills. The comments of CMRS carriers underscore that slamming and cramming are either uncommon or unknown in the CMRS industry. PrimeCo's Comments note, for example, that complaints or questions regarding billing format and content issues are an insignificant segment of overall customer queries to PrimeCo's customer representatives. *See* PrimeCo's comments at 3.

a service plan that includes a bucket of "local" and/or "interexchange" minutes.[17/] CMRS carriers typically bill their subscribers directly, not through a bill bundled with that of the incumbent local exchange carrier. And CMRS customers usually enter into agreements with their service providers that specify the terms and conditions of their service and identify the service options selected. Service plans are described in detail in brochures and other materials generally made available at the point of sale. Additionally, Comcast provides "welcome" kits that provide detailed information about the carrier's services. Carriers also maintain websites with information about equipment and service plans.[18/] Therefore, CMRS customers have many service alternatives, have information available to be reasonably well informed of the range of services the CMRS carrier provides through any number of media, and, with the help of a service or sales representative, will select a service plan that suits their anticipated pattern of wireless use.

Once the customer is activated on the CMRS system, there is no apparent ability for another CMRS carrier to "slam" that customer. A critical difference is that Preferred Interexchange Carrier ("PIC") changes -- the place where mischief is most likely to occur -- exist only in the landline interexchange market. Customers come directly to the CMRS carrier for service. Any change of carrier in the CMRS market is not a "customer-to-interexchange carrier-

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[17/] CMRS carriers, operating in an increasingly competitive market, have attempted to differentiate themselves by developing new services and service combinations that include customer bills with summary pages and call by call detail billing options. The recent introduction of Comcast's single rate plan options is but one example of wireless service innovation designed to remain competitive in the market and to generate new subscribers.

[18/] For example, Comcast's website address is http://www.comcast.com/cellular. The website has an FAQ section that deals with billing issues, among other things.

to incumbent local exchange carrier" transaction. This direct billing and customer care relationship in CMRS greatly reduces the potential for slamming or cramming.[19/]

There also are technological reasons why slamming is not a problem in the CMRS industry. In order to receive service at all, a mobile handset must be programmed and activated on a particular CMRS system (and assigned an account and a telephone number by that carrier). The wireless phone will not function automatically on another carrier's network without reprogramming, which typically requires a customer to physically bring in their phone to a carrier. Customers know and understand that their mobile phones have to be reprogrammed, or in some cases replaced, when they switch CMRS carriers.[20/]

Finally, competition in the CMRS market places additional barriers on tactics such as slamming and cramming. Unlike the landline local exchange market, customers of CMRS providers increasingly have a range of viable alternative carriers. Acts by any CMRS carrier intended to deceive or trick customers to accept their services would result in increased churn by offended customers and would sully the reputation of competitors in a still maturing marketplace. Thus, competition and the efficiency of the CMRS market, as evidenced by declining prices for service, increased consumer choice of service providers and actual customer churn, may provide the best limits on the types of behavior that concern the Commission in this proceeding.

[19/] As to CMRS, the practice of cramming is also checked by the fact that CMRS carriers do not typically bill on behalf of third party service providers but rather have a direct billing relationship with the CMRS subscriber.

[20/] In cases where the new carrier's modulation scheme is different from that of the previously serving wireless carrier, the phone itself must be replaced.

It is significant that Congress exempted CMRS carriers from the proposed anti-slamming legislation last year because "the number of slamming complaints [involving the wireless industry] has been negligible."[21/] Congress plainly did not believe that a uniform industry-wide approach to billing regulation was needed or appropriate, given that the characteristics of the telecommunications industry's different segments can and do vary. For the same reason, the Commission should except CMRS from the unnecessary application of slamming and cramming rules.

B. There Are Legal and Policy Reasons to Consider CMRS Separately from the Telecommunications Market as a Whole

Regulation that delves deeply into CMRS billing formats -- as opposed to simply confirming jurisdiction to regulate -- is not only unnecessary, it also contravenes the Commission's traditional deregulatory approach to wireless services and the Congressional mandate to rely primarily on market forces rather than regulation.[22/] In the 1993 amendments to the Communications Act, Congress assigned substantive jurisdiction over CMRS services to the

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[21/] S. 1618, 105th Cong. 2d Sess., §101(a) (1998); S. Rep. No. 105-183, at p. 8 (1998); H.R. 3888, 105th Cong. 2d Sess. §101 (1998); H.R. Rep. No. 105-801 at p. 32 (1998). The Commission also recognized that the CMRS industry currently is highly competitive. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Third Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 98-91, 12 Comm. Reg. 623 (rel. June 11, 1998).

[22/] *See CMRS Third Report and Order*, 9 FCC Rcd 7988, 8004 (1994); Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, *Report and Order*, 10 FCC Rcd 7025, 7031 (1995), *aff'd* 78 F.3d 842 (2d Cir. 1996); Amendment to the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8965, 8976 (1996) ("*Flexible Use Order*").

Commission, along with the authority for the Commission to forbear from affirmative regulation of CMRS where the Commission concluded that competition was an effective surrogate.[23/]

The Commission decided to forbear from rate regulation of CMRS services by directing the detariffing of CMRS services.[24/] As a safeguard, Congress directed that the Commission maintain the Section 208 formal complaint process to permit CMRS subscribers to seek redress of any alleged unreasonable carrier practice.[25/] This avenue remains open for customers to obtain relief for any legitimate billing claim. The Commission decided to forbear from tariffing of CMRS because the competitive market is capable of protecting customers from unjust or unreasonable pricing and the formal complaint process is an adequate backstop to address problems of market failure should they materialize.[26/] Nothing in the *Notice* or the comments evidences that these mechanisms are inadequate.

[23/] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-97 (1993); 47 U.S.C.A. § 332(c)(3)(A).

[24/] *See* Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance From Applying Provisions of the Communications Act to Wireless Telecommunications Carriers; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers; GTE Petition for Reconsideration or Waiver of a Declaratory Ruling, 13 FCC Rcd. 16857, 16898 (1998) citing *CMRS Second Report and Order* at 1479-80.

[25/] *CMRS Second Report and Order*, at 1478-81. Nothing in the 1996 Act changed Congress's specific deregulatory mandate for CMRS services. *See* Section 601(c)(1) of the Telecommunications Act of 1996 (uncodified).

[26/] *Id.*

No commenter casts doubt on the Commission's ability to use the Section 208 complaint process to adjudicate issues regarding CMRS carrier practices when and if any problems arise.[27/] The Commission already has the necessary statutory enforcement power under Section 208 to respond effectively to unfair or unreasonable practices of CMRS carriers, so there is no need to impose further regulation in the absence of a demonstrated problem in the CMRS market.

III. THERE ARE SPECIAL ISSUES PRESENTED FOR CMRS IN THE PROPOSAL TO REGULATE FULL DISCLOSURE OF CARRIERS' USF ASSESSMENTS ON THEIR CUSTOMERS

Any guidelines the Commission develops addressing the disclosure and the provision of information to CMRS customers should be consistent with the Commission's approach, regularly emphasized in other contexts, that full competition operates as a more effective restraint on excessive carrier rates or unreasonable carrier practices than does regulation.[28/] A careful examination of the differences between CMRS and landline services demonstrates that different regulatory approaches are required.[29/] Should the Commission require any more specific types

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[27/] *See, e.g.,* Nextel comments at 11-12; Bell Atlantic Mobile comments at 9.

[28/] *CMRS Second Report and Order*, at 1421. *In re* Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service; 10 FCC Rcd. 7842, 7844 (1995) (noting that "OBRA reflects a general preference in favor of reliance on market forces rather than regulation").

[29/] The Commission has recognized that CMRS and landline carriers operate in different competitive surroundings and serve different categories of markets. *See, e.g., CPNI Second Report and Order* at 13 FCC Rcd at 8081. For example, CMRS carriers do not provide traditional wireline "local" or "long distance" service but provide service throughout a local calling area spanning multiple landline local and long distance service areas. CMRS carriers charge through a bundled fee including minutes of use or charge a monthly service fee with airtime charges based on minutes of use, in addition to long distance and roaming charges. CMRS providers may have arrangements with a number of companies, including other CMRS

of disclosures for CMRS billing, it should only specify the very basic types of service information CMRS customers should be told. No matter what regulatory construct is ultimately applied, because of the highly competitive nature and dynamic market characteristics of CMRS, the Commission must give CMRS carriers flexibility as to how they choose to bill and inform subscribers.

A. Universal Service Funding Represents a Net New Cost to CMRS Carriers

The *Notice* reflects the Commission's apparent concern that carriers are choosing to pass-through their universal service assessments to their subscribers. The concern appears to extend both to the characterization of the charge as well as the collection of amounts that may vary from the carrier's universal service program contributions.[30/] However, neither these concerns nor the *Notice*'s proposal to impose full disclosure of the carriers' universal service contributions and review of carriers' recovery from customers are applicable to the CMRS industry. For example, CMRS carriers cannot be called upon to explain to their customers how reductions in interstate interexchange access charges offset their universal service contributions because CMRS carriers

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providers for roaming purposes, billing vendors and facilities-based local and interexchange carriers. Given the integrated nature of the CMRS service offering, it is impractical to require that separate billing pages for each of these services be included in the customer bill. Moreover, unlike the primary service provider, these third party providers who may render services to a CMRS carrier's customers are not in a position to adequately respond to or resolve billing issues.

[30/] Notice at ¶¶ 25-32. The *Notice* proposes the adoption of safe harbor language for carriers to incorporate in billing statements to ensure that the benefits derived by carriers are also communicated. *See Notice* at ¶ 27. This proposal, like the proposal on slamming, appears chiefly aimed at certain identified practices by interexchange carriers rather than by CMRS providers. *See also* Federal-State Joint Board on Universal Service, Second Recommended Decision, CC Docket No. 96-45, FCC 98J-7 (Jt. Bd., rel. November 25, 1998) at ¶ 69.

have not benefited from any reductions in access charges. The universal service program is a net new cost to CMRS carriers and the Commission should respect that characterization.

A central goal of the Commission's universal service program is to eradicate persistent implicit subsidies currently paid by interexchange carriers through interstate access charges and requiring incumbent LECs to reduce their interstate access charges.[31/] While interexchange carriers now contribute directly to universal service, they also benefit greatly from Commission-imposed reductions in their interstate access charges. Incumbent local exchange carriers also are beneficiaries of the new program in certain respects. To date, efforts have been made to ensure that the reductions in access charges will not result in revenue reductions to high cost local exchange carriers, and it appears that will remain the goal.[32/]

By contrast, CMRS providers have enjoyed no reduction in access charges that could be used to offset new mandatory contributions to the federal universal service program. Thus, as to CMRS carriers, any concern expressed by the Commission or the Federal-State Joint Board about whether carriers are fully and adequately explaining to their customers via monthly bills the benefits the carrier has received as a result of the program is inapplicable. CMRS carriers'

31/ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, 9162 (released May 8, 1997)("*First Universal Service Order*"); Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158, 12 FCC Rcd. 15982, 15994-15996 (released May 16, 1997). These orders were directly linked, as the Commission expected that interexchange carriers could use their reduction in access charges to offset contributions to the new federal universal service program and that end users would see no new or higher charges on their interexchange bills. *See also* Letter from Chairman William Kennard to the Honorable Thomas J. Bliley, Jr., December 3, 1997 at 11.

32/ Federal-State Joint Board on Universal Service, *Second Recommended Decision*, CC Docket No. 96-45, FCC 98J-7 (Jt. Bd., rel. Nov. 25, 1998).

mandatory contribution is a new and additional cost of doing business that CMRS carriers have to recover, since there is no regulatory offset for CMRS carriers' contributions.[33/] Thus, "full and complete disclosure" of benefits received by CMRS carriers as contemplated by the Commission would yield little if any change in the manner in which these charges have been formulated or characterized by CMRS providers.

The *Notice* also recognizes that restrictions on commercial speech, such as entries on customer bills, give rise to First Amendment considerations that need to be balanced against any requirement that a commercial message appear in a particular form.[34/] Many commenters expressed concern that regulation not limit their ability to communicate with their customers.[35/] While it is certainly appropriate to hold carriers to a standard of truthfulness and accuracy, the Commission should avoid second-guessing any carrier's decision to plainly label a universal

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33/ It is sometimes argued that, while CMRS carriers did not receive access charge reductions, they received substantial reductions in interconnection charges paid to ILECs as a result of renegotiations under the reciprocal compensation, incremental cost interconnection provisions of Section 252(d)(2) of the Telecommunications Act of 1996. That logic is seriously flawed. First, the statutory authority with respect to interconnection charges was separate and distinct from the provisions requiring that implicit universal service subsidies, commonly acknowledged to be contained in access charges, be made explicit. *See* Section 251 and Section 254 of the Act. Second, it is evident from the record that no attempt was made to balance the reductions in interconnection charges against the imposition of USF on the federal or state level. Finally, and as a testament to the very competitiveness of CMRS, benefits afforded to CMRS carriers through interconnection charge reductions were in many instances passed on to consumers through elimination or modification of the "landline interconnect" fees which formerly were collected by carriers. Thus, any supposed offset was already accruing to the benefit of consumers by the time the new federal universal service program began.

34/ Notice at ¶¶ 15 and 26. *See also* Virginia State Board of Pharmacy *et. al.* v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772, n. 24 (1976).

35/ *See* PrimeCo comments at 13-14, AirTouch comments at 8-9.

service line assessment. The Commission also should avoid regulations limiting a CMRS carrier's ability to communicate with its customers concerning the nature of the USF program and the carrier's assessment to the customer. Comcast believes the best method to address any problem, assuming that there is one in the CMRS market, is for the Commission to act to equalize the fundamental inputs to the universal service assessments for CMRS operators by adopting an Order in the pending *Wireless USF Notice*.[36/]

Carriers must not be untruthful or inaccurate in their labeling of universal service assessments or characterizations of that program. However, as several commenters noted, the Commission already has given guidance on this matter and requires that descriptions not be misleading.[37/] It is Comcast's belief that more guidance is unnecessary.[38/] If, however, the Commission chooses to regulate in more detail, it must allow sufficient flexibility to avoid ensnaring the CMRS market within the broad net of concerns the Commission may have with

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[36/] In the *Wireless USF Notice*, for example, the Commission has recognized the need for further guidance to CMRS carriers to foreclose competitive distortions caused by universal service assessments among CMRS carriers operating in the same geographic markets. Resolution of that issue should address any concerns the Commission has expressed in this proceeding regarding the universal service practices of CMRS carriers.

[37/] *See First Universal Service Order*, 12 FCC Rcd at 9211; *Fourth Order on Reconsideration*, 13 FCC Rcd 5318, 5489 (1997).

[38/] *See also* Time Warner comments at 11 and 15; BellSouth comments at 12 and Sprint comments at 12 and 18. Comcast does not object to the Joint Board's Recommended Decision that standard, nonbinding nomenclature, such as the "Federal Carrier Universal Service Contribution" be considered. Of course, the Commission must weigh against the decision to standardize language the possibility that additional confusion may result as carriers modify their line items yet again to conform to such uniform labeling. In addition, CMRS carriers may desire to combine all USF assessments (federal and state) into one line item or even to pass on portions of all increased costs of regulatory compliance in one or more line items. They should have the freedom to do so.

other industry segments; and it must confirm that, while the line item assessments on a customer should not be labeled as a mandatory federal charge, the charge itself may be mandatory, with any customer's refusal to pay constituting grounds for termination of service.[39/]

B. Billing Organization and Content Issues

General Commission guidance as to basic and necessary billing formats and disclosures is appropriate if those guidelines are flexible and appropriately tailored to account for the dynamics of particular industry segments. Guidelines should not preclude or discourage the wide variety of legitimate and innovative pricing and service programs in effect in the CMRS industry. The goal should be to decrease regulation while ensuring that consumer information is appropriately disseminated. Comcast contends that it is best for appropriate guidelines for CMRS to emerge from case-by-case enforcement proceedings against fraudulent or deceptive carrier practices.

Comcast strongly supports permitting CMRS carriers to make certain required disclosures in carrier-disseminated materials other than monthly billings.[40/] Many commenters correctly observed that already lengthy CMRS bills disclose much of the information that the *Notice* cited as potentially important to an informed subscriber.[41/] As many commenters noted,

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[39/] *See First Universal Service Order*, 12 FCC Rcd 8776, 9199, 9208, 9209 (1997); *see also* Comcast/Vanguard Petition for Reconsideration, CC Docket No. 96-45 at 4 (September 2, 1997).

[40/] *See, e.g.,* Omnipoint comments at 8-10; Ameritech comments at 10-11.

[41/] For example, the Commission's proposal to display the name of the reseller on the bills is practiced by most CMRS carriers. *See* CenturyTel's comments at 3-5; PrimeCo's comments at 8.

mandating disclosure language and minimum disclosure requirements could greatly increase the expense of producing monthly bills and create the unintended result of heightening CMRS customer confusion. For CMRS at least, effective disclosures can be made in a wide array of information resources that are readily available to subscribers (*e.g.*, subscriber contracts, brochures, Internet websites, welcome kits, or via annual or per change notification). The Commission guidelines should state that these items serve as adequate vehicles for customer disclosures.

A uniform rule requiring certain disclosures on a *monthly* basis also may foreclose introduction of new technological capabilities and ignore consumer preferences for shorter and simpler bills.[42/] Uniformity runs the risk of creating, rather than resolving, potential confusion.[43/] Other commenters note that paperless bills, an efficient enhancement tool for both carriers and subscribers, could be imperiled by the *Notice*'s proposals.[44/] While the Commission should ensure that customers are adequately informed and should be protected against deceptive practices by carriers, the Commission should not adopt guidelines that either turn the CMRS bill into an encyclopedia or that unduly hamper change in billing communications.

[42/] Comcast notes that Commission rules on cable privacy require communication only on an annual basis. *See* Section 631 of the Communications Act, 47 USC § 551(a)(1). There is no obvious reason why the situation with respect to CMRS subscriber disclosures need occur with any greater frequency.

[43/] For example, a notification of a service change on the bill could be redundant with other methods, such as the notification by mail that is chosen by certain carriers for acknowledging the addition of new services or features to a customer's account.

[44/] *See* BellSouth's comments at 6.

Regardless of how the Commission proceeds with respect to notice and billing format, it must confirm, without equivocation, that its action is not intended to upset the jurisdictional separation of authority for rates and ratemaking that govern carrier operations. With respect to CMRS, that means reaffirming that the statute gives the Commission exclusive jurisdiction over CMRS rates.[45/] The Commission should also make plain that, by virtue of Section 332's jurisdictional mandate, state courts are *not* the appropriate fora to judge the propriety of CMRS carrier rates or to delve into ratemaking and rate remedies. This includes matters involving disclosure claims that are inextricably intertwined with the CMRS carriers' underlying ratemaking practices, such as measurement of the billing interval, application of termination charges, rounding up and similar issues.[46/]

This issue is particularly important in this proceeding. CMRS carriers have been inundated with state law complaints that are really poorly disguised efforts to rerate carrier charges for services, or to award class-wide rate decreases or adjustments without any attempt on the part of plaintiffs to demonstrate actual damages. If the Commission were to adopt a standard

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[45/] *See* Section 332(c)(3)(A) of the Act. Under this section, States can petition the Commission for authority to regulate rates for CMRS services, for a certain period of time, if they can prove that CMRS constitutes a replacement for a substantial portion of the landline telephone exchange service. Until the Commission grants such a petition, all CMRS carrier rate regulation is vested with the Commission.

[46/] This issue is squarely raised in Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls in Whole-Minute Increments, DA97-2464 (Public Notice, November 24, 1997). *See* Smilow v. Southwestern Bell Mobile Systems, Inc., Civ. A. No. 97-10307, filed in the U.S. District Court, District of Massachusetts. *See also* Comcast Comments filed December 24, 1997; Comcast reply comments filed January 8, 1997 on the Smilow Petition.

or prescribe any language with respect to CMRS billing practices while failing to clarify jurisdiction, the bell would be sounded for another round of needless, extortionist litigation. State courts certainly are permitted to adjudicate billing matters in some circumstances. However, when disclosures are inextricably tied to billing practices or ratemaking decisions, and whenever the relief sought is class-wide rerating in the form of damages or otherwise, the Commission's exclusive jurisdiction over CMRS rates is implicated. Only the Commission (and federal courts) have the ability to delve into CMRS rates and ratemaking.[47/] While this issue is squarely posed in the petition pending before the Commission in the Smilow Petition, the Commission should not overlook its significance when addressing the matters in this proceeding.[48/]

C. Carrier Overrecovery of Universal Service Contributions from Customers

The Joint Board and the Commission have indicated concern that carriers, potentially including CMRS providers, are over-collecting from their customers for universal service and pocketing profits from the program. Specifically, the Joint Board recently recommended that the Commission analyze whether carriers with universal service line item surcharges should be

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[47/] *See* Comcast Comments on Smilow Petition filed December 24, 1997, *See also* Comcast Reply Comments filed January 8, 1998.

[48/] Comcast does not suggest the Commission resolve the Smilow petition in this proceeding. It is concerned, however, that the Commission not inadvertently rule on jurisdictional issues in this proceeding without considering the impact of those decisions on the matters raised in the pending Smilow Petition.

required to assess contributions to their customers at the same rate as the carrier itself is assessed.[49/]

First, as the Commission itself has observed, it is unlikely for a CMRS carrier to gouge a customer on a USF assessment because of the competitive nature of the industry.[50/] Only a year ago the Chairman of the Commission, in written response to questions from Congressman Bliley on the likely impacts of universal service, noted that the Commission did not anticipate that the universal service program would result in higher rates to customers overall. With specific regard to CMRS, the Chairman's letter states: "Rates for wireless services, for example, have been declining overall as competition in the wireless industry increases."[51/]

This is correct. Wireless prices are competitive. Customers routinely and easily switch CMRS providers. Moreover, demand for CMRS is elastic as evidenced by still relatively low

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[49/] The *Notice* and the *Recommended Decision* both observe that this and other practices such as allocating a disproportionate share of universal service charges to certain classes of customers "might contravene section 201(b) of the Act." *Recommended Decision* at ¶ 69.

[50/] Letter from Chairman William Kennard to the Honorable Thomas J. Bliley, Jr., December 3, 1997 at 12.

[51/] Letter to the Honorable Thomas J. Bliley, Jr., December 3, 1997 at 12. *See also* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Third Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 12 Comm. Reg. (P&F), 623, 663 (1998) which confirms that "[t]he CMRS marketplace is an evolving and complex industry where new services using emerging technologies . . .compete with existing products. . . . These developments are having beneficial effects for consumers, to whom competition is bringing more choices at lower prices . . . ." *See also,* Federal-State Joint Board on Universal Service, Fifth Order on Reconsideration and Fourth Report and Order, CC Docket No. 96-45, at ¶ 25 (released June 22, 1998).

penetration rates and high churn.[52/] Customers have not come widely to view wireless services as a necessity. For these reasons, it is unlikely that any CMRS carrier will seek to inflate a line item, since doing so will put its customer at risk to a competitor.

Second, the Commission has made it plain that carriers are entitled to recoup their costs of contributing to the program in any lawful way, and has found it to be in the public interest for carriers to amend their customer contracts to assess these new universal service charges.[53/] Flat charges are certainly lawful. Rate deregulated carriers, such as CMRS, should be permitted broad latitude in determining how to recover those costs. Any attempt by the Commission to dictate how costs are to be spread across customers or collected would implicate a carrier's ratemaking decisions as well as its decisions to classify groups of customers according to their usage of the service or other objective factors.

There also are enormous practical problems associated with the prescription of charges or imposition of rules prohibiting "overcollection." As Comcast has pointed out in filings in the Universal Service proceeding, because of the design of the program and the way contributions are assessed, carriers have no ability to plan more than a few months ahead. The size of a carrier's contribution, the contribution factors and the relative sizes of the federal funds change

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[52/] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 12 Comm. Reg. (P&F) 623, 625, 633, 636-637 (1998).

[53/] *See First Universal Service Order,* at ¶ 851. For CMRS carriers in particular the Commission confirmed that, as interstate carriers, CMRS carriers should assess universal service charges against their entire telecommunications service charge. *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-620, *Fourth Order on Reconsideration*, 13 FCC Rcd. 5318, 5489 (1997).

quarterly.[54/] And within the past year the Commission has made several statements regarding the commencement, billing, size and scope of the program which it has subsequently revised.[55/] The frequent changes to the program have engendered confusion within the industry that may account for some of the variability of surcharges on customer bills.

Further, the universal service program is not static and requires carriers to report revenues in arrears. In deciding to spread the assessment to customers, carriers have had to make educated guesses as to the changes in their customer bases and revenues over a time period.[56/] These estimates may not prove accurate in a dynamic, competitive, dramatically changing telecommunications marketplace. Further, as the Commission has acknowledged, the USF Worksheet was not designed for CMRS carriers, and requires CMRS carriers to make a number of judgments about matters for which they have no direct information or experience (for example regarding interstate end-user revenues which are not readily determined for wireless carriers).[57/] This compounds uncertainty. Particularly when the program itself is in such a state

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[54/] Comcast/Vanguard Joint Petition for Reconsideration in the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, September 2, 1997.

[55/] As recently as two weeks ago, for example, the Commission substantially modified the contribution factor for the federal schools and libraries program for the first quarter of 1999 only. Those types of changes, on extremely short notice, affect a carriers' ability to plan for appropriate assessments. Public Notice, Proposed First Quarter 1999 Universal Service Contribution Factors and Proposed Actions, CC Docket No. 96-45 (rel. December 4, 1998).

[56/] Several carriers have filed waiver petitions based upon their changing revenue circumstances from year to year or for special relief based on their particular circumstances. *See*, AMSC Subsidiary Corporation Request for Waiver, CC Docket No. 96-45, Memorandum Opinion and Order, released November 4, 1998; United Native American Telecommunications, Inc. Request for Waiver, CC Docket No. 96-45, released November 4, 1998.

[57/] Comcast appreciates that the Commission has recognized the particular challenges CMRS carriers face and has initiated a proceeding to address the lingering questions

of flux, the Commission should avoid second guessing carriers that are trying to estimate their contributions in good faith, or punishing those that fail to get the "right" answer.[58/] If the real concern is transparency of the pass-through assessment, the Commission is most apt to achieve that goal through a per line or per unit assessment on carriers, as recently recommended by the Joint Board.[59/]

Finally, the Commission and the Joint Board must not underestimate the complexity of a regulatory rate review of CMRS carrier's universal service assessments. The Commission has rate-deregulated CMRS carriers by forbearing from tariff regulation. The only way the Commission could effectively review a rate that may be charged as a line assessment for

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CMRS providers have regarding their reporting responsibilities. Federal Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45 (released October 26, 1998). Comcast also appreciates that the Commission has recognized that CMRS carriers should not be restricted to recover contributions to the federal universal service support mechanism solely through interstate services. Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End-User Common Line Charge at ¶ 309 (December 30, 1997).

58/ Comcast notes, for example, that the Commission is still frequently revising significant aspects of the USF Worksheet. It recently directed that USF line item assessments be listed on the Worksheet, and that contributions be paid on these assessments. Public Notice, Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, CC Docket No. 97-21, 96-45, DA98-1519 (rel. July 31, 1998), adding a new line 48 to report revenues derived from charges assessed on end-users to recover contributions to universal service support mechanisms. Recently the Commission determined that inside wire maintenance is not an assessable telecommunications service and directed carriers to remove those revenues prospectively. Federal State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-206, Sixth Order on Reconsideration (rel. November 17, 1998).

59/ This was an option recently endorsed by the Federal-State Joint Board. *See* Federal-State Joint Board on Universal Service, Second Recommended Decision, CC Docket No. 96-45, FCC 98J-7 (Jt. Bd., rel. November 25, 1998) at ¶ 72.

universal service is to have a rate prescription proceeding, as required under Section 205 of the Act, for each carrier. Indeed, such a review would entail an investigation of the carrier's practices, rates, program administration costs and other overheads to determine whether the rate, and its universal service component in particular, is just and reasonable.[60/] Pursuant to Section 205 of the Act, the Commission is not allowed to reach such a conclusion without a full statutory hearing. Because CMRS carriers have relied upon the Commission's previous statements of principles on carrier pass-throughs and have chosen to assess the universal service charges in a variety of ways, the Commission would be wading into a ratemaking quagmire if it now began to review each assessment and scrub the elements that may be included. Moreover, the Commission has always examined whether "market power" existed as a predicate for acting in this role. It would be an astonishing reversal of prior Commission policy if nondominant carriers in competitive markets, who by definition cannot exercise market power, were brought under the Section 205 process.[61/]

[60/] The Commission does not need to explicitly announce its action as a rate prescription for a regulation to have that effect. The courts have held that actual impact of the Commission action rather than its form will be decisive in determining whether the Commission is prescribing a rate. *See* American Telephone and Telegraph Co. v. FCC, 449 F.2d at 451, n. 12. In this case, the Commission's proposed action would have the same effect as a Section 205 rate prescription and the Commission would thus be compelled to comply with Section 205 procedural requirements.

[61/] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd. 15982, 16138-16141 (1997); Hyperion Telecommunications, Inc. and Time Warner Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, Memorandum Opinion and Order, 12 FCC Rcd 8596, 8608; Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, First Report and Order, CC Docket No. 79-252, 85 FCC 2d. 1 (1980) (*"Competitive Carrier First Report and Order"*).

IV. CONCLUSION

As the Commission examines how best to inform and protect telecommunications customers from deceptive or illegal practices, it must balance any demonstrated need for the regulation against the carrier's right to communicate with its customers as well as the role of competition in regulating questionable practices. The best approach to dealing with bill disclosure and formatting issues is to determine where there is a proven record of problems and regulate accordingly. Once this analysis is completed, it should lead the Commission to either forbear from acting with respect to the CMRS market,-- as seems to have been the direction in which Congress was headed -- or, at most, to issue only flexible, non-binding guidelines. The Commission's existing complaint procedures have been found to be the best means to guarantee lawful behavior as well as clarity in CMRS billing, and no evidence in the record contradicts that conclusion.

The Commission's suggestions with respect to universal service-related disclosures are problematic given the current absence of stability and predictability in the program. It is extremely difficult for the Commission to judge the appropriateness of a carrier's universal service program disclosures to customers as well as its recovery scheme and assessment rate. Ultimately, the standard for disclosures should be one of truthfulness. So long as a statement is not misleading, the Commission should not prescribe text. At the same time, any review of CMRS assessments would require a highly complex review of the rates of nondominant carriers in competitive CMRS markets. If the Commission wishes to track each carrier's dollar for dollar recovery of its universal service contribution from its customers, there are better and more direct

means than those proposed in the instant *Notice* to achieve this goal, such as adoption of a per line universal service charge.

Respectfully submitted,

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December 16, 1998

CERTIFICATE OF SERVICE

I, Roberta L. Lindsay, a legal secretary for Dow, Lohnes & Albertson hereby certify that on this 16th day of December 1998, I served by hand delivery, a true copy of the foregoing **Reply Comments**, upon the following:

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